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In The

Supreme Court of the United States

SNOHOMISH COUNTY; STEPHEN HOLT, Director, Snohomish County Department of Planning and Development Services,

Petitioners,

v.

KIM GOBIN; GUY MADISON; THE TULALIP TRIBES OF WASHINGTON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF SKAGIT COUNTY IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37(c), Skagit County respectfully submits this brief amicus curiae in support of petitioner, Snohomish County. Written consent to the filing of this amicus brief has been granted by counsel for all parties.[1] Copies of the consent letters have been lodged with the Clerk of the Court.

Skagit County is located in the northwest portion of Washington State and is one of the state's fastest growing areas. Three federally recognized Indian Tribes have reservations within the boundaries of Skagit County: the Swinomish Tribe, the Sauk-Suiattle Tribe, and the Upper Skagit Tribe. A fourth tribe, the Samish Tribe, currently has pending before the Bureau of Indian Affairs a proposal to transfer approximately seventy-five acres located in Skagit County from fee status to federal ownership in trust. If the proposal is granted, the Samish Tribe is likely to seek reservation status. Because of the presence of the reservations within the County and the pressures of the County to comply with state and federal environmental regulations, Skagit County has a substantial interest and stake in the determination of whether it can exercise *in rem* zoning and land use jurisdiction over reservation land held in fee by tribal members.

The opinion below holds that a state or local government cannot zone or impose land use regulations against reservation fee lands when tribal members own those

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[1] Pursuant to Supreme Court Rule 37(6), counsel for amicus authored the brief in whole. Amicus solely funded the preparation and filing of this brief.

lands in unrestricted fee simple. As a result, the lower court's ruling stands for the proposition that a state and local government's authority to assert land use jurisdiction will turn on whether a tribal member or nonmember owns the land at any given time, despite the land being fully alienable and encumberable. Amicus believes that the ruling below severely impacts how local and state governments can consistently enforce state and federal land use regulations.

STATEMENT OF THE CASE

This case involves the question of whether state and local governments have authority to zone or impose land use regulations on reservation fee land when a tribal member owns the land in unrestricted fee simple.

In this case, Kim Gobin, a registered member of the Tulalip Tribes of Washington, owns a twenty-acre parcel of land located on reservation land in conventional fee simple. In 1962, restrictions on its sale, encumbrance and taxation were removed.

In 1999, Gobin submitted to the Tribes an application to rezone and construct twenty-five single-family homes on the parcel. The application did not seek to build tribal housing, but would instead be marketed to the general public. Indeed, based on current trends, it was likely that non-tribal members would purchase many of the homes.

The Tribes conditionally approved the project.[2] Snohomish County does not assert jurisdiction over any restricted lands held in trust; however, this land was not held in trust, but in fee simple, and the County asserted its jurisdiction. Under Snohomish County's density regulations, Gobin would only be allowed to construct ten homes instead of the proposed twenty-five.

Gobin sought a declaratory judgment that the County lacked land use jurisdiction over her land since she is a tribal member. The Tribes intervened, also seeking a declaration that the County lacked jurisdiction.

The Court of Appeals for the Ninth Circuit held that Snohomish County lacked land use jurisdiction over Gobin's land. The court reasoned that Congress had not expressly authorized County regulation of reservation fee lands owned by tribal members. *Gobin v. Snohomish County*, 304 F.3d 909, 916 (9th Cir. 2002). The court also held that there were no "exceptional circumstances" allowing the assertion of state jurisdiction over the on-reservation activities of tribal members. *Id.* at 917-18.

The issue presented for this Court's resolution is whether reservation fee land which is freely alienable and encumberable can escape state or local government land use regulation. It also presents the important question of when exceptional circumstances will justify a county exercising jurisdiction over reservation fee land when owned by a tribal member.

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[2] The conditions are unrelated to the issues involved in this case.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(c) lists among the considerations governing review on certiorari the circumstance when a United States court of appeals has decided a federal question that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. Both of these grounds for review are present in this case.

I.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *COUNTY OF YAKIMA*

The Ninth Circuit's decision ignores the principles of *in rem* jurisdiction on fee land established by this Court in *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992).

The question presented in *County of Yakima* was whether the County of Yakima could impose an *ad valorem* tax on so called "fee-patented" land located within the Yakima Indian Reservation, as well as an excise tax on sales of such land. This Court reasoned that a fee patent would not subject a tribal member to plenary state jurisdiction, but fee ownership would free the land of "all restrictions as to sale, encumbrance or taxation." *Id.* at 264. In the opinion, this Court drew a distinction between *in rem* and *in personam* jurisdiction and maintained that there was no impediment, statutory or otherwise, to a state's *in rem* jurisdiction over lands patented in fee. *Id.* at 264-266.

This Court reached this conclusion based on Sections 5 and 6 of the General Allotment Act ("GAA"). The Court reasoned that both sections manifested a clear intent to allow states to tax fee patented land based on *in rem* jurisdiction over the land. Section 5 of the GAA provided that "at the expiration of the trust period, the United States will convey [the land] by patent to [the] Indian . . . in fee, discharged of [the trust] and free of all charge or incumbrance. . . . " 25 U.S.C. § 348. Section 6, as amended by the Burke Act, stated that when the lands have been conveyed in fee to the Indians, "then each and every allottee shall have the benefit of and be subject to the laws, both criminal and civil, of the State or Territory in which they may reside. . . . " 25 U.S.C. § 349.

Gobin's land was not patented in fee under the GAA, but rather under the Treaty of Point Elliott. Nevertheless, the allotment policy under the Treaty was consistent with the later enacted GAA. *See Lummi Indian Tribe v. Whatcom County,* 5 F.3d 1355 (9th Cir. 1993). Although the GAA is not directly applicable to Gobin's land as noted by the Ninth Circuit, the GAA shows Congressional intent to allow state and local jurisdiction regardless of ownership of the land as long as the land was not still owned by the federal government and held in trust.

Public Law 280 and Wash. Rev. Code ch. 37, the state statutory chapter implementing Public Law 280, also indicates Congress' intention that Snohomish County has *in rem* jurisdiction over Gobin's land. RCW 37.12.010 gives

the State of Washington jurisdiction over all fee patent lands within Indian country.[3]

> The state of Washington hereby obligates and binds itself to assume criminal and **civil jurisdiction over** Indians and **Indian territory, reservations**, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation **and held in trust** by the United States, unless the provisions of RCW 37.12.021 have been invoked.

RCW 37.12.010 (emphasis added).

Gobin's land is not held in trust by the United States, nor has the United States imposed any restriction against alienation.

> The most significant feature of the [amended RCW 37.12.010] was its provision for the extension of at least some jurisdiction over all Indian lands within the State, **whether or not the affected tribe gave its consent**. Full criminal and civil jurisdiction to the extent permitted by Pub.L. 280 was extended to all fee lands in every Indian reservation and to trust and allocated

[3] Public Law 280 is codified at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, and 28 U.S.C. § 1360.

> lands therein when non-Indians were involved. . . .

State v. Cooper, 928 P.2d 406 (Wash. 1996).

The Court below dismissed arguments based on Public Law 280 by noting that in *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1976), the Ninth Circuit concluded that zoning was not applicable to Indian Reservation trust lands. Critically, the land in question in *Santa Rosa* was trust land, not fee land. It is undisputed that counties have no authority to regulate land which is owned by the federal government in trust for a tribe. *Puyallup Tribe Inc. v. Department of Game of State of Washington*, 433 U.S 165, 172-173, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977). However, once the land is released from the trust, it is fully subject to the laws and regulations of the state and county, as is any other land.

This Court has limited the authority of a state[4] to exercise civil jurisdiction under Public Law 280 on an Indian reservation. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987). That case, however, is distinguishable from the present case because it involved state regulation of the activities of the tribes themselves, not the regulation of fee land which is owned by a member of a tribe. Here, Snohomish County is not regulating the activities of the Tribe.

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[4] In Washington, counties are arms of the state. *State ex rel. Spokane v. DeGraff*, 143 Wash. 326, 255 P. 371 (Wash. 1927).

The Ninth Circuit decision is also at odds with another opinion from that circuit. In *Dillon v. Antler Land Company of Wyloa*, 507 F.2d 940 (9th Cir. 1974), *cert. denied*, 421 U.S. 992, 95 S.Ct. 1998, 44 L.Ed.2d 482 (1975), the Ninth Circuit held a tribal member was subject to Montana state law because she owned the land in fee, not trust. The Ninth Circuit based its decision on the plain language of section 25 U.S.C. § 349 and, since the land was freely alienable, it was subject to the laws of the State of Montana.

This Court should review the decision of the Ninth Circuit because it conflicts with the express *in rem* jurisdiction granted to state and local governments over reservation fee lands recognized by this Court's decision in *County of Yakima*.

II.

THE DECISION BELOW IGNORES THE EXCEPTIONAL CIRCUMSTANCE TEST ESTABLISHED BY THIS COURT

After concluding that Congress has not expressly authorized county regulation of reservation fee lands owned by tribal members, the Ninth Circuit held that there were no "exceptional circumstances" permitting the assertion of state jurisdiction over the activities of tribal members on reservation land. *Gobin*, 304 F.3d at 917-18.

The Ninth Circuit opinion almost eviscerates the "exceptional circumstances" test set forth by this Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 212-214, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987). Specifically, the Ninth Circuit readily dismissed Snohomish County's interests that it claimed were "exceptional

circumstances," including protecting endangered species, regulating County-maintained roads and storm sewers, providing a continuum of land use enforcement for all fee lands, and complying with applicable health and safety codes. *Id.* at 917. In rejecting these circumstances, the opinion fails to include any analysis of how the County's jurisdiction of fee lands would interfere with the Tribe's governance of its reservation.

The decision ignores one of the underpinnings of the "exceptional circumstances" test set forth in *Puyallup Tribe, Inc. v. Department of Game of State of Washington*, 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977). That case upheld state regulation of tribal members' hunting and fishing activities in the Puyallup River both on and off its reservation. Critically, a basis for finding state regulation applicable to tribal members was that the tribe "alienated, in fee simple absolute," all lands in which the Puyallup River flowed.

The Ninth Circuit opinion assumes the County's position would jeopardize tribal sovereignty. However, it ignores the limited role of tribal sovereignty on unrestricted fee lands which was set forth in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 109 S.Ct. 2994, 106 L. Ed. 343 (1989). At issue in *Brendale* was whether a tribe has the authority to zone particular tracts of land within its boundaries of the reservation owned by nonmembers. In a plurality opinion, this Court held that a tribe does not have authority to impose zoning restrictions on land owned by nonmembers. Therefore, the Tribe's interests in regulating fee land is already diminished.

According to the Ninth Circuit, it is hard to imagine what would constitute exceptional circumstances. This Court should grant the petition for certiorari in this case to resolve this issue.

III.

THIS CASE INVOLVES IMPORTANT ISSUES OF LAW THAT SHOULD BE RESOLVED BY THIS COURT

The importance of this case is found both in the breadth of its impact and the nature of the issues involved. At a minimum, the outcome of this case will impact all reservation fee land located within the Ninth Circuit. However, it is more likely it will impact every county government in the nation because it will be relied on by other jurisdictions.

The lower court's decision creates the absurd result that zoning and land use regulation over reservation fee land may constantly shift based on ownership of the land at a given time. In *County of Yakima*, this Court reasoned that a county's ability to tax fee land stems directly from its alienability because it would be "strange to withdraw protection [of the restriction on alienation] and permit the Indian to dispose of his lands as he pleases, while at the same time releasing it from taxation." *County of Yakima*, 502 U.S. at 263.

The reasoning that a County may exercise *in rem* jurisdiction on fee land relating to taxation is equally applicable to *in rem* zoning and land use restrictions. It would be just as strange to allow a tribal member to sell his fee land without restriction while exempting the land

from zoning and land use regulation that apply to all other development.

As a practical matter, whether a state or local government can exercise jurisdiction over tribal land should be determined based on whether the land is owned in fee simple or held in trust. This system makes more sense given its easy application. A state or local government can easily determine if land is held in fee versus trust and know whether they can exercise jurisdiction over the land. In addition, the system is more manageable because ownership of fee land can change quickly while land held in trust must go through an extensive process to be converted to fee land.

In sharp contrast, the Ninth Circuit's decision makes the applicability of County land use regulations depend upon the status of the owner of the land in relation to the tribe. A parcel of land may be sold to or from a tribal member instantaneously. When it comes to enforcing land use regulations, counties will have a difficult time determining who is the owner at the moment enforcement is necessary and whether that person is currently a tribal member. This creates a negative incentive for counties to enforce any land use regulation within reservations, even on the fee land of nontribal members which is clearly not subject to tribal regulation. *Brendale*, 492 U.S. at 428.

The Ninth Circuit opinion also encourages non-tribal members to conditionally transfer land to tribal members who could develop the property under more lenient tribal zoning laws. Once the permit approvals were obtained, the land could be transferred back to the non-tribal member. The encouragement of those types of dealings is bad government, bad planning, and bad law.

Thus, this Court should grant review to settle an important question of federal constitutional law impacting a significant segment of the population and the implementation of public policy and regulation.

CONCLUSION

Whether a state or local government can exercise *in rem* zoning and land use jurisdiction over reservation fee land held by a tribal member is an issue needing definite resolution by this Court. Review is also necessary so that this Court can finally resolve the important question of law left unanswered by *County of Yakima* and *Brendale*. Amicus respectfully urges this Court to grant the petition for writ of certiorari and reverse the judgment of the Ninth Circuit Court of Appeals.

DATED: February 6, 2003.

Respectfully submitted,

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